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The Multiracial Epiphany

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THE MULTIRACIAL EPIPHANY OF *LOVING*

*Kevin Noble Maillard**

INTRODUCTION

In the collective memory of the United States, mixed race did not exist until 1967. By legally recognizing interracial marriage, *Loving v. Virginia*[1] established a new context for racial possibilities in the United States. In addition to allowing marriage across the color line, *Loving* required states to give legal credence to interracial sex and romance. In theory, *Loving*, as a juridical approval of race mixing, heralded the development of a racially nuanced and complex America. This decriminalization shifted the legal discourse of miscegenation from illicit to legitimate, beginning with the status of the mixed race offspring. For the children of *Loving*, legal obstacles to interracial kinship have become a thing of the past.

Praise of *Loving* as a transformative decision for civil liberties and family formation limits itself to a post-1967 epiphanic moment that heralds the arrival of a new multiracial United States. Professor Jim Chen notes that "[i]ntermarriage and its handmaiden, interbreeding, are running riot in America."[2] From another angle, Deborah Ramirez declares that "the number of biracial babies is increasing at a faster rate than the number of monoracial babies."[3] The mass media has expressed wonder at the "biracial baby boom,"[4] and, presently, open declarations of mixed parentage are

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1. 388 U.S. 1 (1967).

2. Jim Chen, *Unloving*, 80 Iowa L. Rev. 145, 153 (1994).

3. Maria P.P. Root, The Multiracial Experience: Racial Borders as a Significant Frontier in Race Relations, *reprinted in* The Multiracial Experience: Racial Borders as the New Frontier, at xiii, xiv (Maria P.P. Root ed., 1996).

4. *See* Maria P.P. Root, *The Multiracial Contribution to the Psychological Browning of America*, *in* American Mixed Race: The Culture of Microdiversity 231, 231 (Naomi Zack ed., 1995) ("The biracial baby boom has significant implications for . . . discussing the physical and psychological 'browning of America.'"); Vincent J. Schodolski, *Mixed-Race Americans Feel Boxed in by Forms*, Chi. Trib., Feb. 14, 1996, at 8 ("[T]he number of mixed-race Americans has grown quickly."); *see also Interracial Marriages Increase*, Wall St. J.,

common, perhaps even fashionable.[5] Novelist Danzy Senna (who is black, white, and Jewish) proclaims that "America loves us in all of our half-caste glory."[6] In a combination of popular and scholarly work, Gary Nash gloriously portends,

> The invisible Berlin Wall, the racial wall, is being dismantled stone by stone. . . . Today, in Hawaii, 60 percent of babies born each year are of mixed race. In Los Angeles County, the rise in the percentage of Japanese American women who marry out of their ethnic group has risen from one of every ten in the 1950s to two of three today. Similar trends pertain to other Asian American groups. Seventy percent of American Indians tie bonds with mates who are not Indian. Even the most enduring nightmare of Euroamerica—racial intermarriage between Black and white partners—is no longer extraordinary. Outside the South, more than 10 percent of all African American males today marry non-Black women, and Black-white marriages nationwide have tripled since 1970. Mestizo America is a happening thing. A multiracial baby boom is occurring in America today.[7]

Such statistics trace their origins back to *Loving*. The growth of interracial marriage and multiracial children occurred post 1967 after the dismantling of the antimiscegenation regime. Along with the end of legally mandated segregation, the gates to previously prohibited choices had been opened. In a recent Gallup poll, white approval of interracial marriage increased from four percent in 1958 to seventy-five percent in 2007.[8] Due to *Loving*, the total number of interracial marriages increased from 157,000 in 1960 to 1,161,000 in 1992.[9]

This increase is laudable, but at the same time mistakenly limited. *Loving* has claimed a place in the legal imagination as the landmark event for legitimating the existence of and condoning the formation of multiracial

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May 9, 1994, at B1; Joseph Carroll, *Most Americans Approve of Interracial Marriages*, Gallup, Aug. 16, 2007, http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx.

5. Many popular articles trace the growing popularity of interracialism in America. *See* Ellis Cose, *Our New Look: The Colors of Race*, Newsweek, Jan. 1, 2000, at 28, 29 ("The rise of the mixed-race—or *café au lait*—society has led some to predict the end of distinctions based on ethnicity, racial appearance or ancestry."); *see also* Larry Muhammad, *Hip to Be Hybrid*, Courier-Journal (Louisville, Ky.), Aug. 8, 1999, at H1; Rob Walker, *Whassup, Barbie? Marketers Are Embracing the Idea of a Post-racial America: Goodbye Niche Marketing*, Boston Globe, Jan. 12, 2003, at D1. Danzy Senna, author of the novel *Caucasia*, has written a satirical piece on fetishistic treatments of miscegenation. *See* Danzy Senna, *The Mulatto Millennium*, *in* Half and Half: Writers on Growing Up Biracial and Bicultural 12 (Claudine Chiawei O'Hearn ed., 1998).

6. Senna, *supra* note 5, at 12.

7. Gary B. Nash, *The Hidden History of Mestizo America*, 82 J. Am. Hist. 941, 959 (1995) (footnotes omitted).

8. Carroll, *supra* note 4.

9. U.S. Bureau of the Census, Table 1: Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992 (1994), http://www.census.gov/population/socdemo/race/interractab1.txt.

families in America. Both the scholarly discourse and popular banter celebrating the new "Brown America"[10] treat 1967 as the collective genesis for the legitimation of mixed race in America. Such a level of recognition routinely assigns and grants this single case[11] the special status of the Multiracial Epiphany: both courts and critics routinely cite *Loving* as the watershed moment in the legal regulation of intimacy and marriage.[12] While *Loving* certainly had a monumental impact on the fundamental right to marriage, crediting *Loving* as the defining legal moment for mixed race in America undergirds the idea that racial hybridity and relationships did not exist before 1967.

This essay takes issue with the overemphasis on *Loving* as the enabler for mixed race in the United States, and concomitantly, its effect on legitimating a varied interracial past. Gary Nash's thesis demonstrates a notable irony: if our just, democratic system openly permits and justifies the "happening thing" of mixed race, why is this same valorization and recognition not extended to the pre-*Loving* era? Turning to a single court case to celebrate a social phenomenon that has existed at the margins of American culture mistakenly erases the past of racial amalgamation that preexisted the legality that *Loving* provided. In the system of the racial binary[13] that has been established in the United States, mixtures that disrupt the notion of racial purity, particularly those that originate in the time period before *Loving*, are presumed to be deviant and abnormal. The collective racial memory in the United States, unlike that of Mexico[14] or Brazil,[15] operates from an assumption of racial purity and sexual avoidance of miscegenation. This national culture of disbelief of racial intermixture has permeated our views of history and law.

10. Richard Rodriguez popularized "the browning of America," the idea of an intermixture of ethnicities and race in the new millennium. *See generally* Richard Rodriguez, Brown: The Last Discovery of America (2002).

11. *See generally* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991) (questioning whether the U.S. Supreme Court has the ability to effect widespread social change).

12. *See generally* Rachel H. Moran, Loving *and the Legacy of Unintended Consequences*, 2007 Wis. L. Rev. 239.

13. *See* Frank H. Wu, Yellow: Race in America Beyond Black and White 263, 271–82 (2002); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 Wm. & Mary L. Rev. 571 (1995). *See generally* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 Tex. L. Rev. 1181 (1997).

14. *See* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 Cal L. Rev. 1585, 1608 n.69 (1997) (explaining that "mixed race is almost part of the official culture in Mexico"). *See generally* Colin M. MacLachlan & Jaime E. Rodríguez, The Forging of the Cosmic Race: A Reinterpretation of Colonial Mexico (1980).

15. *See* Gilberto Freyre, The Masters and the Slaves: A Study in the Development of Brazilian Civilization (2d ed. 1986). *But c.f.* Carl N. Degler, Neither Black nor White: Slavery and Race Relations in Brazil and the United States (1971).

This essay argues that looking to *Loving* as the birthplace of interracialism reinforces the legal authority and resultant legacy of the antimiscegenation regime that it replaced. In addition to outlawing interracial marriage, these restrictive laws created a lasting presumption of illegitimacy for historical claims of racial intermixture. Defenders of racial purity could depend on these laws to render interracial relationships, whether married or unmarried, improbable and illegitimate.[16] Not all states had antimiscegenation laws,[17] but the sting of restriction extended to other states, forging a collective forgetting and denial of the existence of mixed race. The absence of a national, judicial acceptance of mixed race facilitated a collective belief in racial purity. Because it was illegal and immoral, it could not have occurred. As states were withholding the marital right from biracial couples, they attempted to deny and erase the intimate reality of persons, like Richard and Mildred Loving,[18] who would have sought alternatives to the prohibitive law.

Present assertions of interracialism must face and overcome this dominant reconstruction of the past that presumes the nonexistence of mixed race. This essay emphasizes the law's influence in the construction of a collective cultural memory of firmly established racial lines. More substantially, this essay confronts our collective fears about memory, narrative authority in historical interpretation, and the role of boundaries in the construction of the past. To illustrate the captivating influence of *Loving* on collective memory, this essay examines well-known contemporary disputes over racial identity and membership, which usually have two sides: one for a conception of the past that includes interracial mixing, and another that denies the legitimacy of such a possibility.

Unabashedly, this essay revels in political gossip. Some of the claims are valid, others less so. In three different sections, this essay assesses the allegations of mixed race people who claim descent from Thomas Jefferson,[19] Strom Thurmond, and George Washington. This essay

16. Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 29 (1984) (describing the effect of antimiscegenation law on the status of children); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv. C.R.-C.L. L. Rev. 255, 268 n.59 (2002) (noting that children born to interracial couples were disinherited and considered illegitimate).

17. For a thorough chronological list of state laws prohibiting interracial marriage, including specific intermixtures, see Phyl Newbeck, Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving 227–31 app. c (2004).

18. *See generally* Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of* Loving v. Virginia, *in* Family Law Stories 7 (Carol Sanger ed., 2008).

19. This essay pays much attention to the Thomas Jefferson-Sally Hemings controversy, but it does not recount the history of the alleged liaison. Instead, it utilizes the considerable body of literature concerning this issue to make claims about the relationship between historical iconography and collective memory. This literature, framed by scholars such as

explores the handling of these assertions by "legitimate" white family members, varying from terse acceptance to outright denial. In some cases, the objections verge on claims of treason or historical blasphemy toward the unassailable pantheon of American statesmen. In the midst of the media frenzy and popular attention received by these "cases," one may observe that each of these claims finds common ground in the historical anomaly presented by persons who claim relations to an interracial past. Not only do they command a reexamination of the private lives of political leaders, but they also force recognition of a preexisting legacy of interracialism in the United States. These examples, despite their well-known progenitors, strongly indicate that varied racial histories exist in seemingly unlikely (or unwilling) families. Thus, rather than interpreting these claims as tabloid cases for their legal and social anomalies, we should expand our collective expectation of historical interracialism beyond the Multiracial Epiphany of *Loving*.

I. COLLECTIVE MEMORY DEFINED

The collective memory of race relations in the United States overlooks and omits the reality of mixed race. There existed a squeamishness, a disgust, a denouncement of "race mixing" that sparked riots,[20] instituted legal prohibitions,[21] and constructed categories,[22] each of which insist upon the genealogical separation of black, white, and red. Accepting the alternative entails a violation of the law, social mores, and perhaps morality—each is a considerable factor in assessing historical possibilities in the interpretation of the past. At the same time, recognizing the anachronistic validity of a mixed race past in defiance of a prohibitive law challenges the legal and social views toward miscegenation that posits racial polarity.

What happens to the very real past of mixed race if law and social practice say that it never existed? At the very least, there exists a paradox:

Merrill Peterson, Dumas Malone, and Annette Gordon-Reed, makes for a "canon" of texts to which this essay responds.

20. The Tulsa Race Riots of 1921 were allegedly sparked by an incident involving a black man, Dick Rowland, and a white woman, Sarah Page, in a downtown elevator. Walter F. White, *The Eruption of Tulsa*, Nation, June 29, 1921, at 909–10.

21. In Virginia, the Racial Integrity Act of 1924 prohibited most marriages between whites and nonwhites, with an exception made for "whites" of one-sixteenth or less of American Indian ancestry. *See* Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 Mich. J. Race & L. 351, 357 (2007).

22. Virginia's Racial Integrity Act required citizens to register their race with the State Bureau of Vital Statistics. *See id*. at 369. Louisiana had a similar agency for racial registration and approval, with Naomi Drake wielding cruel power over those persons she suspected of hiding nonwhite ancestry. Drake was described as "an autocrat [who] was for fifteen years the arbiter of who was black and who was white." *See* Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 5–6 (2003) (citation omitted) (internal quotation marks omitted).

in order for past facts to be considered, they must first exist.[23] With unobtainable standards of evidentiary proof, detractors impose political silence and cultural amnesia. This precludes the legitimate inclusion of a legally confounding status of mixed race into American collective memory. In this realm of legal and social recognition—collective memory—a group conceptualizes its present as a collection of its remembered past.[24] This forging of group identity rests upon a generally cohesive understanding of events that occurred previously. This construction of group history shapes the group's conception about membership.[25] Thus, the combination of original narratives and group organization fashions what commentators have termed "collective memory."[26] While history is the reconstruction of

23. As explained by Jean-Francois Lyotard,

> To have "really seen with his own eyes" a gas chamber would be the condition which gives one the authority to say that it exists and to persuade the unbeliever. Yet it is still necessary to prove that the gas chamber was used to kill at the time it was seen. The only acceptable proof that it was used to kill is that one died from it. But if one is dead, one cannot testify that it is on account of the gas chamber . . . . [I]n order for a place to be identified as a gas chamber, the only eye witness I will accept would be a victim of this gas chamber; now, according to my opponent, there is no victim that is not dead; otherwise, this gas chamber would not be what he or she claims it to be. There is, therefore, no gas chamber.

Jean-Francois Lyotard, The Differend: Phrases In Dispute 3–4 (Georges Van Den Abbeele trans., 1988).

24. A distinction must be made between memory and history. While both concern the retelling of past events, scholars distinguish these two concepts by temporal differences in their constitution and effects. Professors Austin Sarat and Thomas Kearns differentiate memory from history by defining the former as a disciplined approach to assessing the truth of the past, and the latter (history) as a constitutive composition of group identity. *See* Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* History, Memory, and the Law 1, 10–11 (Austin Sarat & Thomas R. Kearns eds., 1999). Most notably, Sarat points out that memory, not history, concerns partisan views of the past that affect the particular conditions of the present. *Id*. at 10 nn.49 & 51 (highlighting other scholars, including Pierre Nora, who take similar notice of the interdependency of past and present).

25. In telling stories and sharing narratives, a group exhibits definitive markers of community. A group's recalling of the past entails recognition of their common origin and makeup. Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, *in id.*, at 131, 133–34.

26. *See* Roy Rosenzweig & David Thelen, The Presence of the Past, Popular Uses of History in American Life (1998); Tense Past (Paul Antze & Michael Lambek eds., 1996); Alon Confino, *Collective Memory and Cultural History: Problems of Method*, 102 Am. Hist. Rev. 1386, 1390 (1997) (defining collective memory as "an exploration of a shared identity that unites a social group, be it a family or a nation, whose members nonetheless have different interests and motivations"); Carolyn Kitch, *Anniversary Journalism, Collective Memory, and the Cultural Authority to Tell the Story of the American Past*, 36 J. Popular Culture 44 (2002) (discussing the role of journalism in defining national memory); Michael Schudson, *Dynamics of Distortion in Collective Memory*, *in* Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past 346, 346–64 (Daniel L. Schacter ed., 1995); *see also* Joseph Roach, Cities of the Dead (1996); Mona Siegel, *"History is the Opposite of Forgetting": The Limits of Memory and the Lessons of History in Interwar France*, 74 J. Mod. Hist. 770, 773 (2002) (quoting Henry Rousso's definition of national collective memory as "an ensemble of representations and attitudes toward the past, proper to a collectivity and variable in time").

"what is no longer," memory is in "permanent evolution, open to the dialectic of remembering and forgetting."[27] In both of these views, the "reality" of the past lies somewhere in between the concept of memory and history.

Conceptions of a monoracial pre-*Loving* past perpetuate a static approach to mixed race that definitively precludes the legitimization of its existence. These conceptions, however, are accumulations of historical contingencies; memory itself is an anachronism. An examination of the past of mixed race reveals a historical context where this existence was ignored and suppressed. This entails two primary misapplications of contemporary standards for past situations. First, this amnesia toward mixed race presents a skewed view of past events according to dominant and desired conceptions of what the past could or should have been, rather than the actual past itself. Thus, reliance on this past (that never "existed") to justify present manifestations of interracialism (that do "exist") makes for a Sisyphean task. Second, present imaginations of the past are largely based upon unquestioned representations, which stack rhetorical possibilities against personal narrative. Such assumptions stem from a dominant historical belief in the rarity of amalgamation and the repugnance of race mixing. It is within this temporal misplacement that the memory of racial purity gains political legitimacy, resulting in exasperation for the mixed race subjects who seek legitimacy.

Against a collective memory and legal framework where races are forbidden to intermingle, both asserters and deniers of a mixed racial past measure the probability of its occurrence. On both sides, narrators conflate fact and fiction, or history and memory, to retell the past to their best advantage. These individual renditions show the political motivations and legal justifications behind different allegations of the "truth." Deniers of mixed race rely on legal and social privilege to create an alternative memory that rejects the existence of such liaisons. They are aided by antimiscegenistic rhetoric and practice, which not only delegitimizes interracial intimacies, but insists on their legal impossibility. At the same time, the claimant/asserter must confront the collective memory and legal prohibition that forgets and refuses her cross-racial connection. Such claims rooted in the past face a roadblock of denial anchored by 1967's *Loving* decision, which outlawed the last institutionalized vestiges of racial difference and inequality.

27. Sarat & Kearns, *supra* note 24, at 10 (citing Pierre Nora, *Between History and Memory:* Les Lieux de Mémoire, Representations, Spring 1989, at 7, 8–9).

II. REIMAGINING THE LEGAL HISTORY OF MIXED RACE

Forty years after *Loving*, discussion of interracialism as a threat to political stability and social respectability persists.[28] "Great efforts are made today to deny that this or that great man had illicit relations with Negro women," wrote J.A. Rogers in 1942.[29] Decades later, in the post-*Loving* era, the same statement rings true. As recently as 1999, U.S. Senator Robert Bennett created a controversy that framed interracial sex as the penultimate destroyer of political careers. Commenting on George W. Bush's security as a Republican nominee for President, Bennett predicted no problems unless Bush "step[ped] in front of a bus" or "some black woman [came] forward with an illegitimate child."[30] Recent events further illustrate the endurance of interracial controversy. A commercial during the 2005 Super Bowl sparked a flood of complaints to the Federal Communications Commission when it featured a blonde white woman disrobing in the locker room in front of a clothed black football player.[31] Many of the complaints focused on the suggested nudity, with an unannounced statement that the interracial content of the commercial was "inappropriate."[32] In October 2006, opponents of Tennessee Senate candidate Harold Ford, Jr., aired commercials that drew attention to his interracial dating patterns.[33] Both the Super Bowl and the Ford commercials capitalize on the insecurities of a viewing populace accustomed to suppressing overt racism. Modern progressiveness and interracial tolerance fail to overcome deep seated insecurities that are no longer prohibited by law but still discouraged in practice.

Examining the most public examples of interracialism shifts the collective awareness from margin to center. Public debates reveal fear and disbelief: fear of the erosion of racial boundaries and venerable cultural memories. Because denunciation originated in a preinterracial context—the pre-*Loving* regime—the specter of denial persists. Disbelievers and protectors of the fiction of racial purity rely upon legal impossibility to

28. Disapproval of interracialism is most fervent with pairings involving a black male and white female. *See generally* Martha Hodes, White Women, Black Men: Illicit Sex in the Nineteenth Century South (1997); Elise Lemire, "Miscegenation": Making Race in America (2002).

29. 2 J.A. Rogers, Sex and Race: A History of White, Negra, and Indian Miscegenation in the Two Americas 221 (1970).

30. *N.A.A.C.P. Infuriated by Remark About Bush*, N.Y. Times, Aug. 17, 1999, at A12.

31. Judy Battista, *ABC Puts N.F.L. in "Desperate" Situation*, N.Y. Times, Nov. 17, 2004, at D1.

32. Clay Calvert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science and Public Policy*, 41 Cal. W. L. Rev. 325, 355 (2005) (quoting Battista, *supra* note 31).

33. Ford, an African American bachelor, had attended a fundraiser sponsored by Playboy Magazine. The ad featured a young blonde woman staring coquettishly at the camera, beckoning Ford to "call me." Robin Toner, *In Tight Senate Race, Attack Ad on Black Candidate Stirs Furor*, N.Y. Times, Oct. 26, 2006, at A1 (describing the controversial Republican campaign commercial).

refute the legitimacy of interracial relations between blacks and whites. This part examines three contemporary debates of interracial denial and legitimacy rooted in historical contexts that rendered such claims unlikely. In each case, the "plaintiffs" present different forms of proof of their historical interracialism: science, physical presence, and oral history, respectively.

First, this essay addresses the paradigmatic case of Thomas Jefferson and Sally Hemings. The kinship claims of the presidential slave descendants generated a host of criticism,[34] but less attention has been directed to the most recent defense of the Jefferson family written in 2001 by a "blue ribbon committee" of scholars.[35] Second, this essay analyzes "South Carolina's Public Secret"—the web of silence and compliance that surrounded Strom Thurmond's biracial daughter, Essie Mae Washington-Williams. This examination of the past, situated in the epicenter of the antimiscegenation regime, contradicts interracial denial. Lastly, this essay turns to the rejected claims of descendants of West Ford, who claimed George Washington was his father. This literature, compelling but problematic, raises valid questions about the legitimacy of interracial claims in opposition to a legal culture that fails to embrace their historical authenticity.

A. *Thomas Jefferson and Sally Hemings: Proof with Science*

The Jefferson-Hemings relationship is the paradigmatic story of denial and acceptance of a miscegenated past. In this battle of narratives, a vicious and personal antagonism arises. Keeping alive this 200-year-old controversy, a group of white Jeffersons and scholars refuses to bow to the "priests of political correctness" while persisting to venerate a sterilized memory of the President. Substantial evidence suggests that Jefferson fathered a child with his slave, Sally Hemings.[36] Despite the growing body of evidence that suggests a long-term liaison between slave and master, ardent deniers seek to "set the record straight" by expunging and disproving the allegations of miscegenation from the collective memory. In 2002, John H. Works, Jr., a past president of the Monticello Association,[37] circulated

34. *See* Maurice E.R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 Alb. L. Rev. 241, 263, 264–65 (2000). *See generally* Helen Bishop Jenkins, *DNA and the Slave-Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 Harv. BlackLetter L.J. 211 (2000); Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 Mich. J. Race & L. 33 (2001).

35. *See infra* notes 46–56.

36. *See infra* note 73.

37. The Monticello Association is a group of 700 descendants of Thomas and Martha Jefferson who "[1] preserve and care for the graves and grounds of the Monticello graveyard, [2] protect and perpetuate the reputation and fame of Thomas Jefferson and [3] encourage association and friendship among Mr. Jefferson's descendants." The Monticello Association, http://www.monticello-assoc.org/hemings.html (last visited Feb. 25, 2008).

an e-mail to his relatives showing a black man with a zipper for a mouth.[38] This e-mail, in part, celebrated the association's decision to bar descendants of Sally Hemings from membership. In a seventy-four to six vote, the association voted to restrict membership to descendants of Jefferson's legitimate children,[39] in opposition to an American public persuaded by DNA evidence of Jefferson's paternity.[40] In this refusal to succumb to external pressure,[41] members of the Monticello Association not only closed their membership, but also ratified an account of the past that discredited claims of interracial liaisons and silenced accounts of racially subversive sexualities.

The association's vote belied deeper concerns about Jefferson's reputation. Disgruntled by a growing acceptance of Jefferson's possible interracial affair, a faction of his white descendants formed the Thomas Jefferson Heritage Society.[42] With a goal of furthering the honor and integrity of Thomas Jefferson and opposing those who would "seek to undermine [his] integrity,"[43] the organization specifically planned to counter the historic findings of the Thomas Jefferson Foundation, a progressive research group that supported the belief that Jefferson fathered interracial children.[44] Characterizing the foundation's report as "biased"

38. *See* Elizabeth Shogren, *Vote Rejects Hemings Claim*, L.A. Times, May 6, 2002, at A12.

39. *Id*. Denials by Jefferson family members reveal an underlying dissatisfaction with multiculturalism and a knee-jerk reaction to inclusiveness. At a Monticello luncheon, Theresa Shackleford, a descendant of Martha Jefferson, announced, "We're not racists. We're snobs." Leef Smith, *Jeffersons Split over Hemings: Descendants Delay Action on Ex-slave's Family*, Wash. Post, May 17, 1999, at B1. At a Jefferson-Hemings symposium, Ron Doggedd, a member of the National Organization for European-American Rights—founded by former Ku Klux Klan leader David Duke—announced, "There seems to be a politically correct air here that I find extremely disturbing." Gerald Mizejewski, *Experts, Hecklers Vie over Jefferson*, Wash. Times, Apr. 9, 2000, at C13. In Albemarle County, Virginia, a lawyer and white Jefferson descendant rebuts, "'We've never put any credit to it. . . . Maybe we should do what Mr. Jefferson did and not dignify it with any comment.'" Lynne Duke, *Jefferson & the Question of a Slave Son: Oral Tradition Recalls a Boy Named Tom, While Historians Are Unconvinced*, Wash. Post, Apr. 13, 1993, at B1.

40. In 1998, Dr. Eugene Foster, an Oxford geneticist, published an article in *Nature* magazine citing DNA research to assert the genetic probability that Thomas Jefferson "was the father of Eston Hemings Jefferson," one of Sally's children. Eugene A. Foster et al., *Jefferson Fathered Slave's Last Child*, 396 Nature 27, 27–28 (1998).

41. *See supra* note 39.

42. It would be unfair to characterize the white descendants as a monolithic group in their opposition to the Hemings family; some of Jefferson's recognized descendants push for inclusion. Upset that a faction of the family has demanded additional evidence beyond DNA research, association member Lucian Truscott proclaims, "[They're] acting like two-bit redneck diner owners in 1955 who are happily denying seating to black people." Leef Smith, *For Black and White, Monticello Homecoming for All*, Wash. Post, May 16, 1999, at C1.

43. *See* The Thomas Jefferson Heritage Society, http://www.tjheritage.org/default.asp (last visited Feb. 25, 2008).

44. The foundation, which owns and operates Monticello, concluded, "The DNA study, combined with multiple strands of currently available documentary and statistical evidence, indicates a high probability that Thomas Jefferson fathered Eston Hemings, and that he most likely was the father of all six of Sally Hemings's children appearing in Jefferson's records."

propaganda, "shoddy scholarship," and "poor judgment,"[45] the heritage society gathered a "blue ribbon scholars commission" to counter an "agenda that has the denigration of the founding fathers in general, and Jefferson in particular, as a central tenet."[46] The scholars commission convened to produce an "authoritative and balanced study" and to examine evidence "in accordance with customary standards and weight."[47] Its year-long study concluded that available evidence was insufficient to establish that members of the Hemings family were descendants of Jefferson.[48]

The findings of the scholars commission and the approval of those findings by the Monticello Association reveal a conflict of memory that mimics a backlash to cultural diversity. David Mayer, a commission member, expressed concern with the "disturbing trend in . . . history,"[49] while another member, Robert Ferrell, lamented the "virtual climate of accusation that is flourishing in our time."[50] Some members of the scholars commission, such as Robert Turner, Ferrell, and Mayer, proudly express "concern for Jefferson's legacy"[51] and interpret the claims of miscegenation as "revisionist history,"[52] libelous,[53] and misleading.[54] Others, such as Lance Banning, Harvey Mansfield, and Jean Yarbrough, assume a moderate stance, supposing that "there remain legitimate questions that cry out for better answers than we can give."[55] According to John Works, these claims form one aspect of a "radical new agenda" designed by "the priests of political correctness."[56] The fear and loathing of political correctness incites defensiveness among protective family members, who lament the "danger of losing our unique heritage to the forces of manipulated

Thomas Jefferson Found., Report of the Research Committee on Thomas Jefferson and Sally Hemings (2000), http://www.monticello.org/plantation/hemingscontro/dnareport6.html.

45. Press Release, Thomas Jefferson Heritage Soc'y, Group of Defenders of Thomas Jefferson's Reputation Settle Lawsuit Brought by Owners of Monticello 1 (Sept. 5, 2000) (on file with author).

46. Pat Crouch, Thomas Jefferson's Reputation and Fame (n.d.) (on file with author).

47. In the same way that the Supreme Court writes opinions on the most contested issues in the nation, the scholars commission produced a 300-page document consisting of a majority opinion, concurrences, and a dissent. *See* Scholars Comm'n on the Jefferson-Hemings Matter, Final Report (2001) [hereinafter Scholars Report].

48. John H. Works, Jr., Letter to the Editor, Wash. Post, May 15, 2002, at A26 ("The scholars commission and more than 94 percent of Thomas Jefferson's descendants believe the allegation that Thomas Jefferson fathered children by Sally Hemings is a myth.").

49. Scholars Report, *supra* note 47, at 279 (concentrating on what Meyer describes as a disturbing trend in the history profession).

50. *Id*. at 274.

51. *Id*. at 279.

52. *Id*. at 191.

53. *Id*. at 263.

54. *Id*. at 3.

55. *Id*. at 258.

56. Letter from John H. Works, Jr., to the Monticello Ass'n (Mar. 19, 2002) (on file with author).

conformity."[57] These statements emphasize discontent with a perceived pressure to consider marginalized stories about race; less obviously, they call for rigorous standards of evidence while appealing to morality and patriotism.

The convenient silence on interracial contact allows members of the Monticello Association to remain secure in their denial of miscegenation. Jefferson did not leave any record of a relationship with Sally Hemings, and her children's' birth documents failed to indicate their paternity.[58] Evidence is required to establish paternity, yet the laws and social practices of that time facilitated white men's denial of paternity when fathering mixed race children. Jefferson's actions risked moral condemnation, but the law would have protected him by rendering the paternity legally impossible.[59] This necessary element of proof, deemed unwaiveable by the Monticello Association, stands as a prohibitive (and perhaps protective) obstacle to acknowledging an interracial presidential family.

Scholars who reject the possibility of a claim unquestionably rely upon claims of white Jeffersons as proof of the implausibility of the affair. This presumption of competence necessarily pits minority oral history against majority legal history.[60] Martha Hodes argues, "'It seems that if sources are white, their words are somehow taken as fact, even if they are recountings of recountings of conversations . . . . Slave memoirs are ridiculed as unreliable.'"[61] While hearsay concerns are not at issue here, scholars and insiders eagerly accept second, third, and fourth hand accounts of white, slave-owning relatives of the President without hesitation. Annette Gordon-Reed has questioned this systematic privileging of white narratives. Her work builds upon the frustration felt by black people whose opinions, histories, and beliefs received second-class status in comparison to whites.[62] Similarly, Steven Shapin terms such elite privilege "*perceptual*

57. Patricia Crouch, Rumor Mill News, Assault on a Founding Father, http://www.rumormillnews.com/jefferson.htm (last visited Feb. 28, 2008).

58. Jefferson kept a meticulous record of his plantation holdings, including birth records, in what he termed a "Farm Book." Thomas Jefferson's Farm Book (Edwin Morris Betts ed., 1999).

59. Under slave law, the established practice of *partus seqitur ventrem* maintained that children of interracial unions took the status of the mother. This insured the father's security in property by declaring slave children as illegitimate and thus beyond the protection of the law. Wilbert E. Moore, *Slave Law and the Social Structure*, 26 J. Negro Hist. 171, 185 (1941). For further discussion of legal structures protecting the interracial sexual interests of white males, see Joshua D. Rothman, Notorious in the Neighborhood: Sex and Families Across the Color Line in Virginia, 1787–1861 (2003).

60. *See generally* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).

61. Leef Smith & Michael Fletcher, *Mixed Feelings over Jefferson Affair: Blacks Feel Vindicated by Evidence, Upset That Rumors Were Doubted for So Long*, Wash. Post, Nov. 8, 1998, at B3 (quoting Martha Hodes).

62. *See, e.g.*, Annette Gordon-Reed, Thomas Jefferson and Sally Hemings: An American Controversy (1997) [hereinafter Gordon-Reed, American Controversy]; Annette

competence."[63] Thus, "because they said so" is problematic, because it unquestionably grants legitimacy on a racial basis.[64] The primary source that the scholars commission's study lists as a "jury" who would render a "not guilty" verdict consists solely of white relatives, "all of Thomas Jefferson's relatives who left a record of opinion on the issue," and white neighbors and colleagues.[65] Slave narratives are summarily dismissed.

The historical vision of Jefferson blurs the distinctions between memory, myth, and fact. The modern understanding of the founding father as political patriarch and historical antecedent does not leave room for sexual relationships with slaves. Dumas Malone claims that an interracial affair would be "virtually unthinkable in a man of Jefferson's moral standards."[66] Virginius Dabney, who claims that he has "read everything that [he] could find bearing upon [Jefferson's] guilt or innocence,"[67] has called the stories of his "relations" with Hemings "slanderous falsehoods . . . spread against him long ago."[68] Jeffrey T. Kuhner, professor of history at the University of Virginia, has declared that acceptance of Jefferson's relationship with the sixteen-year-old Hemings would unfairly paint him as "essentially a child-molesting rapist, and that is far from what we know of him."[69] Garry Willis once wrote that it was "psychologically implausible" because Jefferson believed in "beauty and refinement" and divorced himself from the "squalor and horror of the slavery that existed below him on the mountain top."[70] Other Jefferson specialists have called the stories "pathetic,"[71] bemoaning what they could do to the national character.[72]

Gordon-Reed, *Engaging Jefferson: Blacks and the Founding Father*, 57 Wm. & Mary Q. 171 (2000).

63. Steven Shapin, A Social History of Truth: Civility and Science in Seventeenth-Century England 75 (1994).

64. As one scholar has noted,

> If the objectivist view is not point-of-viewless, then is the account it privileges still worth the reverence the law accords it? A great deal depends on just what the observer's point of view includes and excludes and what consequences such a view has. If the objectivist account is one point of view among many (and not point-of-viewless as against other point-of-viewful accounts), then one needs some other account explaining why it should be privileged, if indeed it is to be.

Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073, 2091 (1989).

65. Scholars Report, *supra* note 47, at 170 (internal quotation marks omitted).

66. Smith & Fletcher, *supra* note 61.

67. Virginius Dabney, The Jefferson Scandals: A Rebuttal 3 (1981).

68. *Id*. at 133–34.

69. Jeffrey T. Kuhner, *Bush Recognizes Black Jefferson Kin*, Wash. Times, Apr. 13, 2001, at A1 (internal quotation marks omitted).

70. Gordon-Reed, American Controversy, *supra* note 62, at 169 (quoting Garry Wills).

71. Douglass Aidar, *The Jefferson Scandals*, *in* Fame and the Founding Fathers 227, 260 (Liberty Fund, Inc. 1998) (1974).

72. Blaine Harden, *Revival of 'Rumor' Disturbs Jefferson Scholars*, Wash. Post, Feb. 13, 1979, at C1.

Jefferson's defenders require impossible proof, despite statistical probability.[73] The way that modern deniers "remember" interracial sex follows the historically and legally grounded policy of amnesia. On one hand, Jefferson defenders require absolute evidence of paternity, and their concept of proof fixates on an admission of "guilt." This reflects the bizarre invocation of legal standards by the scholars commission, which requires the higher criminal standard of proof—proof beyond a reasonable doubt—by clear and convincing evidence for an act not considered criminal for white men during Jefferson's time or for anyone in our own. On the other hand, Hemings supporters' version of evidence can never meet this arbitrary and unobtainable standard. Their circumstantial evidence does not meet the defenders' standard of proof. This is a Sisyphean task: Jefferson defenders demand scientific and circumstantial evidence to prove the existence of the relationship, yet the social milieu at that time did not discuss or record interracial intimacy.

This incongruity of law and memory creates the perception that certain events never happened. Jefferson defenders, in the interest of preserving the national character and sexual dignity of a founding father, capitalize on the law's historical practice of protecting the private interests of white men.[74] Dorothy Roberts writes, "'It is hard to notice the law's bias because the dominant perspective has seeped into the pre-existing language that shapes our jurisprudence.'"[75] Thus, the absence of perspective becomes a perspective in itself, which disadvantages historically marginalized groups. If law and social practice suppress the memory of miscegenation, then historically based claims of mixed race become nullified. Traditional methods, from this standpoint, unfairly project a disinterested paradigm that presupposes unmitigated fairness and equal application. Considering these racially based methods of proof without a critical eye toward their effect on historically marginalized groups condones the historical illegitimacy of miscegenation.

73. Fraiser D. Neiman argues that Jefferson's paternity is ninety-nine percent certain, considering the nexus of DNA evidence, oral history, and calendar tracing. Fraiser D. Neiman, *Coincidence or Causal Connection? The Relationship Between Thomas Jefferson's Visits to Monticello and Sally Hemings's Conceptions*, 57 Wm. & Mary Q. 198, 199 (2000).

74. Similar to general policies on bastardy, law and social practice sanctioned a cloud of amnesia over interracial liaisons. As Peter S. Onuf has written, "Proper Virginia gentlemen did not talk about the shadow families they produced with their slave concubines." Peter S. Onuf, *Every Generation Is an "Independent Nation": Colonization, Miscegenation, and the Fate of Jefferson's Children*, 57 Wm. & Mary Q. 153, 167 (2000).

75. Austin Sarat & Thomas R. Kearns, *Responding to the Demands of Difference: An Introduction*, *in* Cultural Pluralism, Identity Politics, and the Law 1, 19 (Austin Sarat & Thomas R. Kearns eds., 1999) (quoting Dorothy Roberts).

B. *Strom Thurmond and Essie Mae Washington-Williams: Proof with Presence*

On December 13, 2003, Essie Mae Washington-Williams, a seventy-eight-year-old woman of color, stepped forward and revealed herself as the unacknowledged daughter of the late Senator and segregationist Strom Thurmond.[76] At first glance, the opposing ideologies appear unlikely: staunch segregationist and interracial sex.[77] Thurmond's impassioned speeches for states' rights demonstrated an unwavering stance for enforcement of racial boundaries. Speaking at a 1948 presidential campaign rally, the Dixiecrat candidate stated, "There's not enough troops in the Army . . . to force the Southern people to break down segregation and admit the Negro race into our theaters, into our swimming pools, into our schools and into our homes."[78] Nine years later, he staged a twenty-four-hour filibuster in the U.S. Senate to protest a federal housing scheme that he characterized as "race mixing."[79] Despite Thurmond's later record of race friendly policies and programs,[80] these persistent memories define him as the historical front man for a politically sanctioned racial hierarchy.

Public expectations fail to comport neatly with private actions, and silence facilitates the dual existence of quiet disregard and tacit subsistence. Three months after the senator's death, the "walnut complexioned"[81] woman confirmed long-standing rumors by announcing to the media that she was the product of an affair between a twenty-two-year-old Thurmond

76. Michael Janofsky, *Woman, 78, Says She Is a Daughter of Thurmond*, N.Y. Times, Dec. 14, 2003, at 41.

77. Thurmond once espoused the view that segregation laws "are essential to the protection of the racial integrity and purity of the white and Negro races alike." Kari Frederickson, The Dixiecrat Revolt and the End of the Solid South, 1932–1968, at 106 (2001).

78. Bob Herbert, Op-Ed., *Racism and the G.O.P.*, N.Y. Times, Dec. 12, 2002, at A39 (internal quotation marks omitted).

79. *See* Memorial Addresses and Other Tributes: Held in the Senate and House of Representatives of the United States Together with a Memorial Service in Honor of Strom Thurmond, S. Doc. No. 108-7, at v (2003).

80. In a Senate memorial address celebrating the memory of Strom Thurmond, Senator Joseph Biden recalled,

> The *New York Times*, the liberal *New York Times*, in the late forties—it must have been 1947—wrote about this guy, Strom Thurmond, a public official in South Carolina, who got himself in trouble and lost a primary because he was too empathetic to African Americans. When he was a presiding judge, he started an effort statewide in South Carolina to get better textbooks and materials into black schools, and he tutored young blacks and set up an organization to tutor and teach young blacks how to read. I think it was in 1946 or 1947. The essence of the editorial was that this is "the hope of the South." In the meantime, he got beat by a sitting Senator for being "weak on race."

Id. at 24 (statement of Sen. Joseph Biden).

81. Darryl Fears, *"At Last I Feel Completely Free," Mixed Race Daughter of the Late Strom Thurmond Steps Into Spotlight*, Wash. Post, Dec. 18, 2003, at A2.

and a sixteen-year-old black maid, Carrie Butler, in 1925.[82] Washington-Williams's relationship with Thurmond provides an optimal study for denial because the chain of evidence still exists. Washington-Williams's physicality is her proof, and circumstantial evidence corroborated by others makes her claim unassailable. According to Washington-Williams, it was only by finally revealing her father's identity to the world that allowed her to "feel completely free."[83] Specifically, she was free from the unspoken agreement of silence, which remained intact until Thurmond's death.[84] Thurmond similarly stayed silent about Washington-Williams, his first born child, and he quietly communicated to her that this treatment would not change during his lifetime. Still, Washington-Williams maintains that Thurmond "never asked [her] to hold this fact in confidence."[85] The totality of this silence extended beyond the immediate family, with the convenient compliance of South Carolina news sources and citizens facilitating the nonrecognition of the obvious. During Washington-Williams's years as a student at South Carolina State College, Thurmond, the then-governor, regularly visited her, with little attempt to hide his intentions or identity on the campus.[86] Students did not question his visibility on campus, and they did not publicly insinuate a father-daughter relationship. They just assumed without acknowledgement.

The forces of selective memory allow for the dual existence of reality and fantasy. Making sense of racial boundaries necessitates the compartmentalization of fact and fiction in order to render once-incontrovertible facts questionable.[87] This creative construction of alternative reality dismisses the incongruous so that the illogical becomes rational. Thurmond and Washington-Williams's children and friends, each possessing knowledge of her relationship with her famous father, observed a tacit agreement to refrain from speaking about it. This repression of not

82. Essie Mae Washington Williams, *A 62-Year Old Secret: "Strom Thurmond Was My Father*," L.A. Times, Dec. 17, 2003, at B13.

83. Jeffrey Gettelman, *Final Word: 'My Father's Name Was James Strom Thurmond,'* N.Y. Times, Dec. 17, 2003, at A1.

84. Her children urged Washington-Williams to come forward; she had previously kept her father's identity a secret out of respect for him and for fear that it would harm his political career. Marilyn W. Thompson, *Woman: I'm Daughter of Thurmond*, Sun-News (Myrtle Beach, S.C.), Dec. 14, 2003, at A1.

85. Washington Williams, *supra* note 82.

86. Students and faculty would clear out of the designated building where Thurmond and Washington-Williams were to meet. He would arrive on campus in a "big, black Cadillac limousine" and park in a conspicuous location on campus. Ken Cummins, Strom's Secret (1996), http://www.scpronet.com/point/9610/p04.html (internal quotation marks omitted). Other students had no confusions that the then-governor visited a student at the all-black college. *Id.*

87. Even if circumstances dictate a probable connection between black and white, such as between Thurmond and Washington-Williams, the fiction of racial separation allows deniers and silencers to reasonably portray it as unlikely. This refashioning of fact to align it with fiction quietly imposes convention upon truth, shaping reality in a way that transforms incontrovertible truths into frivolous impossibilities.

only the past but also the very real present registers as a function of southern etiquette that turns a polite eye to the taboo of interracial relations.[88] As the mores and laws of the South made such liaisons illegitimate by law and nonexistent in speech, race mixing became an erasable element of one's past. Sexual intimacy between blacks and whites was not a subversive act provided it was not formally acknowledged.[89] Voluntary distinctions of this type singularly define a regional culture reluctant to come to terms with its historical schizophrenia. To have racial proximity and racial separation coexist requires regulation of plausibility. Thus, selective memory and willful amnesia expunge contradictory and problematic elements, creating a prevailing memory of past and present that, for practical purposes, did not exist.

Divulging the previously hushed information defies a culture that turns a blind eye toward miscegenation. In this regulation of race and memory, the task of bringing interracialism to a discursive forefront continues to agitate detractors who wish to suppress interracial deviance and uphold traditional boundaries. U.S. Representative Joe Wilson criticized Washington-Williams's revelation as a "smear on the image that [Thurmond] has as a person of high integrity," placing doubt on the biracial woman's claims that Thurmond was her father.[90] Wilson also perceived an attack on the dead, an unfair smear on those unable to defend themselves.[91] Joining the camp of resistance, State Senator John Courson, a close personal friend and political protégé of Thurmond's, criticized the story for being "ludicrous" and "absolutely bizarre."[92] Most intriguingly, he objected to Washington-Williams's claim because he had "never heard of any of this from the senator or anyone."[93]

Living witnesses in the position of a narrative minority must overcome presumptions of illegitimacy, with the majority retaining the final judgment on truth. Washington-Williams's self-affirmation did not rest as the lone authoritative source. The deniers mentioned above, Wilson and Courson, changed their stances, apologizing and calling her a "class act" once the

88. *See supra* note 74 and accompanying text.

89. Antimiscegenation law's focus on legitimation of interracial unions secured the sexual freedom of white men by providing a legal loophole that outlawed marriage only. Written law remained silent on unrecorded relationships, thus creating a legal fiction that did not countenance interracial sexuality despite its obvious and repeated occurrence. *See generally* Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550–1812 (1977); Charles Frank Robinson II, Dangerous Liaisons: Sex and Love in the Segregated South (2003); Rothman, *supra* note 59.

90. Jennifer Talhelm, *Reactions to Claim of Kinship Mixed*, Sun News (Myrtle Beach, S.C.), Dec. 14, 2003, at A1 (alteration in original).

91. Thompson, *supra* note 84. Washington-Williams said that she did not come forward until after Thurmond's death "because of their mutual 'deep respect' and her fears that disclosure would embarrass her and harm his political career." *Id.* Even after his death, she told reporters, she only came forward after her children "'convinced me to tell the truth.'" *Id.*

92. Talhelm, *supra* note 90.

93. *Id.*

Thurmond family came forward to confirm the connection. Two days after the public revelation, the family swiftly issued a press release stating that they "acknowledge[d] Ms. Essie Mae Washington-Williams' claim to her heritage."[94] Little resistance came from Strom Thurmond, Jr., who announced, "We have no reason to believe that Mrs. Williams was not telling the truth."[95] These statements revealed a sly concession to her claims, but they do not invite the possibility of establishing a relationship, and they refuse to relax the conventions that had previously maintained the silence and separation. This eloquent and removed ombudsmanship provided the final voice in this controversy. Even though Washington-Williams, as a living witness and article of evidence, could prove herself as the black daughter of Thurmond, she still did not possess the final, authoritative voice that conclusively ruled her story as true. Her challenge to the racial binary only finds resolution in the adjudicating voice of the protected white family.

C. *George Washington and West Ford: Proof with Words*

Claims of racial intermixture may incite defensiveness and denial, but certain circumstances may justify these protestations. Indeed, not all historical assertions of multiracial ancestry are valid, and the position of these weaker claims merits a critical eye. The struggle for acceptance of an interracial past situated within a historical antimiscegenation regime may pose a normative argument: disenfranchised minorities demand entry, majority resists pressure, and a racialized David and Goliath struggle ensues. The Jefferson and Thurmond cases demonstrate persuasive and mostly conclusive evidence of paternity. These two cases differ, obviously, in the receptive attitudes of the white family. The Thurmond family quickly recognized Washington-Williams, while the Hemings clan remained excluded. They correspond, however, in their compelling and clear presentation of facts and circumstances that point to the likelihood of an interracial liaison. These two matters show the perpetual struggle in validating a legitimate voice and the resulting frustrations caused by resistance. In their own ways, these precedents demonstrate how historical claims of mixed race subvert the collective legal memory of separate races.

In 1999, a group of black women in Illinois, Virginia, and Colorado publicly revealed themselves as descendants of George Washington.[96] As direct descendants of a black slave named Venus, the women (the Fords) announced their family's shared belief that Venus bore Washington a

94. Michael Janofsky, *Thurmond Kin Acknowledge Black Daughter*, N.Y. Times, Dec. 16, 2003, at A28 (internal quotation marks omitted).

95. *Id*.

96. Nicholas Wade, *Descendants of Slave's Son Contend That His Father Was George Washington*, N.Y. Times, July 7, 1999, at A14.

mulatto son named West Ford around 1784.[97] Venus lived at Bushfield plantation, ninety miles south of Mount Vernon, as a slave of Washington's brother, John Augustine, and his wife, Hannah.[98] Empowered by little more than oral history and moral resolve, the Fords presented their case to the Mount Vernon Ladies' Association (MVLA),[99] the historical and educational organization that owns and operates Washington's estate. Claiming that "West Ford was more than a shameful entry in the record of America's slavery past,"[100] the family members insisted on the validity and reliability of their claims. Motivated by the efforts of the Hemings' claim, the Fords presented their story as a neglected example of interwoven racial boundaries.[101]

Oral history must be accepted as a legitimate source of interracial affirmation and be able to overcome the legal presumption of the criminality of miscegenation. The Fords strongly rely on the strength of their own words in hopes that their interpretation of the past succeeds as part of Washington's legacy. Furthermore, they realize the narrative disadvantage they face as African American oral archivists. They wish to establish this transhistorical transmission of information as a worthy source of history, equal to "white" sources deemed more reliable. This is their elusive conundrum: the inability to prove what they have been taught to

97. *See id.* Unlike the two previous cases, the following story reduces the interracial controversy to a conflict between oral history, documentary evidence, and collective memory. No corroborating evidence exists, such as DNA tests, physical proximity, or favorable treatment to indicate a relationship between George Washington and West Ford. Nevertheless, six generations of Ford family members have passed on the story that they are the descendants of the first President. Thus, the battle of interracial memory centers on the faithful acceptance of black oral history as a valid historical source. *See generally* Linda Allen Bryant, I Cannot Tell A Lie: The True Story of George Washington's African American Descendants (2004).

98. *See* Bryant, *supra* note 97, at 442, 445–46; *see also* Wade, *supra* note 96.

99. Their mission statement reads,

> The Mission of the Mount Vernon Ladies' Association is to preserve, restore, and manage the estate of George Washington to the highest standards and to educate visitors and people throughout the world about the life and legacies of George Washington, so that his example of character and leadership will continue to inform and inspire future generations.

Mount Vernon Ladies' Ass'n, Mission, http://www.mountvernon.org/knowledge/index.cfm/fuseaction/view/KnowledgeID/38/ (last visited Feb. 25, 2008).

100. Interview with Linda Allen Bryant, http://www.westfordlegacy.com/iq.htm (last visited April 14, 2008).

101. The dedication of the Ford family memoir provides, in relevant part,

> The Ford family wants to document and preserve our legacy and this book serves as a documentation of our heritage. The descendants of West Ford by no means wish to denigrate George Washington, but merely desire the validation and vindication of who we are in American history for our children and our children's children. As you turn the pages of this book, you will gain a closer understanding about the descendants of George Washington, his African American heirs—his blood heirs.

Id. at xiv.

believe. They concede this weakness and have buttressed family history with documentary proof, including historical letters, excerpts of wills, land grants, newspaper articles, and tax records.[102]

As in other cases, adversaries retained reservations about the veracity of the interracial claims. As keepers of the Washington heritage, the MVLA's mission is to uphold the "high[] standards" of being a leader in preservation and in education.[103] An 1858 MVLA pamphlet urged women to answer the call "to gather around [Washington's] grave and become the vestals to keep alive the fires of patriotism."[104] With Washington having no acknowledged descendants, the MVLA replaced the traditional family front of defense, and it politely rejected the claim of a relationship between Venus and Washington, or Washington and West Ford.[105] In contrast to the

102. *Id*. at xii–xiii.

103. Curiously, the Mount Vernon Ladies' Association (MVLA) prominently displayed a nondiscrimination clause directly underneath its mission statement. The MVLA is "An Equal Opportunity Employer," required by law to accept applicants without regard to religion, ethnicity, sex, age, or disability. Mount Vernon Ladies' Ass'n, Application for Employment 1 (2008), *available at* http://www.mountvernon.org/files/employmentapplication2008.pdf. Unlike the Monticello Association, the MVLA is not explicitly limited by family connection or implicitly by race and promises that "[p]rospective employees will receive consideration without discrimination because of race, color, gender, national origin, religion, disability, age or marital status." *Id.*

104. Mount Vernon Ladies Ass'n, An Inventory of Its Records, 1853–1874, http://www.mountvernon.org/visit/plan/index.cfm/pid/332/ (last visited Apr. 13, 2008) (quoting Ann Pamela Cunningham, *An Appeal for Mount Vernon: Mount Vernon—the Property of the Nation*, *in* Mount Vernon Record: Devoted to the Purchase of the Home and Grave of Washington (1858)).

105. First, the MLVA argues that no records support Washington's paternity:

> There is no documentation from the period reporting any extramarital affairs. No contemporaries of George Washington reported this "relationship" during George Washington's lifetime. It is important to note that Washington's second term was acrimonious. Although he was frequently under attack in the press, there were no allegations of infidelity. This is another source that historians would check for evidence of such a relationship. There is no documentary evidence of George Washington frequently taking a slave child to Christ Church. This occurrence is one that would have been particularly noteworthy and would likely have been recorded.

PBS Frontline, Mt. Vernon Responds to the Ford Family, http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/video/tofords.html (last visited on Feb. 28, 2008).

Second, the MVLA notes that Venus and George lived far apart: "The Bushfield Plantation was located in Westmoreland County, approximately 95 miles southeast of Mount Vernon. According to Washington's writings he routinely traveled five miles per hour. Riding for eight hours per day, it would take him more than two days to get to his brother's home." *Id*.

Third, the association claims that he did not have time to travel to Venus:

> George Washington's whereabouts during this period were well documented. Having brought victory to the colonies, George Washington was America's most famous citizen. . . . George Washington was extremely busy with both public duties and rebuilding his estate. In addition, a variety of sources record that visitors to Mount Vernon were numerous, keeping him at home and occupying

Monticello Association, the MVLA's arguments are based less on amorphous concepts, such as the character and morality of the founding father, and more on reasonably plausible facts.[106] Although the issue regenerates an archetypal resistance to interracialism, the underlying tone of the debate appears less racially contentious than its precedents. Unlike the Monticello Association, however, the MVLA's resistance does not materialize as a symbolic defense of American heritage or a concerted opposition to multiculturalism.

Oral history, as the primary source of the Fords' ancestral knowledge and a chief influence in their personal identity, operates as a transgenerational chronicle of events. DNA evidence is not available.[107] In oral history, past, present, and future collide in a single narrative that approximates legend. The Fords' narratological expedition invokes the particular hopes of forward-looking ancestors who transmitted their story for the benefit of their descendants. Linda Allen Bryant, a sixth generation descendant of West Ford and author of *I Cannot Tell a Lie: The True Story of George Washington's African American Descendants*, frequently mentions that every generation of her family has produced a principal chronicler, or a keeper of the family story.[108] She emphasizes the importance of this duty by giving a voice to each chronicler, who in turn passes the narrative torch

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> much of his available time. According to our research, there are very few times when his whereabouts cannot be documented for this period.

Id.

Fourth, the association argues that such travel was inconvenient and impractical: "Early in 1784, regional accounts from numerous sources indicate that the weather was unusually treacherous for several months, with icy and snowy conditions making travel difficult." *Id*.

106. In addition to the arguments above, the MVLA has also theorized that Washington was sterile. He produced no children with his wife, Martha Custis. Historians point out that at the time of their marriage, Martha was a widow with two children of her own, which may suggest that the inability to have children may not have been attributable to her, but to Washington. *See generally* John R. Alden, George Washington: A Biography (1984); Thomas J. Fleming, First in Their Hearts: A Biography of George Washington (1968); James Thomas Flexner, Washington: The Indispensable Man (1974).

107. Washington's body would have to be exhumed from his grave, and the MVLA remains reluctant to comply. Part of his body, such as hair samples, rests in an archive at Mount Vernon. The MVLA announced their cooperation and willingness to provide hair samples for DNA evidence, although presently, genetic technology cannot accommodate this request. Frequently Asked Questions About West Ford, http://www.westfordlegacy.com/mvmtg/qa.html (last visited April 14, 2008); *see* Wade, *supra* note 96.

108. Upon George Ford's death, he surrendered his narrative duties to his great-granddaughter Elise. Bryant, *supra* note 97, at 348.

> [George Ford] wanted to look into his granddaughter's eyes, needed to see what he knew lurked behind them—strength and fortitude—characteristics she would require for her life-long task. . . .
>
> A moment later his voice rang out with a surprising burst of strength, "You are the chronicler. The charge is now yours."
>
> . . . .
>
> In a much weaker voice he went on, "L-Lesey, d-don't let our h-heritage die."

Id.

on to his or her younger successors.[109] This transmission of information marks a significant exchange of memories, for in the transgenerational maintenance of the story, an expectation of continuity and legitimacy supersedes personal interpretation. For family members, the West Ford story is not a personal narrative, or an intimate genealogy, but optimally, an objective history that stays intact throughout the interpretations of its authors.

This method of recording history raises genuine concerns of reliability and legitimacy. Understandably, black people resent the presumption of exaggeration in what has often stood as the sole source of family memory. Dennis Pogue, a preservationist at Mount Vernon, states that oral traditions "have a life of their own . . . oftentimes to embellish and to move in different directions."[110] This statement exemplifies a common mistrust of orality, placing greater emphasis on documentary evidence and other sources deemed more objective and removed from personal interpretation and subjective belief. As it stands, the most extensive account of West Ford boldly rejects traditional standards of evaluating history. In *I Cannot Tell a Lie*, Bryant did not write a historical account, but a historical novel. In doing this, she recreated scenes she gathered from interviews with family members and accounts from scholarly articles. In her recreation of the history of her family, she constructs a narrative topography of the Ford family, using artistic license to fill gaps in the story. Utilizing part imagination and part fact, she assigns sight, sound, and feeling to the story, creating a vivid picture of the past. Bryant gives her characters depth and emotion, and she conceives what they might have said and done. This method of narrative not only records history,[111] but it also establishes a

109. The African American oral tradition has been discussed by a number of authors. *See, e.g.*, Henry Louis Gates, Jr., The Signifying Monkey: A Theory of Afro-American Literary Criticism 192–93 (1988); Lawrence Levine, Black Culture and Black Consciousness—Afro-American Folk Thought from Slavery to Freedom (1978).

110. PBS Frontline, "George & Venus," http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/video/report1t.html (last visited Feb. 28, 2008).

111. Other African American authors have faced this same issue in the recreation of history through the guise of literature. Because the oral tradition runs so strongly as a source of history for these stories, building upon these narratives as a basis for setting and dialogue runs in tandem with the writing of a novel. The author of the novel *Sally Hemings*, Barbara Chase-Riboud, faced similar criticism for recreating the colonial dialogue and settings of the Hemings family. *See* Barbara Chase-Riboud, Sally Hemings (1979). In response to her critique of his review of her novel, Gordon S. Wood wrote, "Chase-Riboud's dialogue may be brief, but it is not lifelike, meaning that it is not entirely historically accurate, which is why I said in the review that it was 'questionable.'" Gordon S. Wood, Letter to the Editor, *The Sally Hemings Case*, N.Y. Rev. of Books, June 12, 1997, at 61. Additionally, the novel *Cane River*, by Lalita Tademy, takes similar liberties, yet its reception differed remarkably, quite possibly because it did not involve, question, or rethink the private lives of iconic American personalities. *See generally* Lalita Tademy, Cane River (2001).

family memory.[112] Her novel is a deeply personal extension of her family's multigenerational belief in their origin, and she assumes her rightful mission of telling their story.

Presenting a historical novel as an authoritative source of truth generates serious questions. It complicates the line between fiction and fact by dramatizing a collective family memory already deemed suspicious by outsiders. One may object to the novel's transformation of oral histories into fiction, and the scripting of communication into dialogue. In this way, this singular view of the past stations itself as the authoritative portal for the transmission of an alleged historical event, thus parlaying fiction as a valid basis for the construction of history. Such representations elevate Bryant's reconstructed dialogues as conversations that actually occurred between the characters.[113] Due to its written form, Bryant's method of establishing a family memory through the medium of fiction approaches traditional standards of assessing history. For the sake of posterity, she venerates the black oral tradition while paying homage to the majority's sense of authoritative history.

Writing a novel and recording those memories in the form of a document that appears historically inspired may revise the past in a way that seems believable and legitimate. From the philosopher Friedrich Nietzsche we learn that representations of the past may become real because they are authoritatively presented as truth, despite their "aberrations, passions and errors."[114] This freedom of novelistic form and historical remembrance allows the Fords to romanticize their past, even to argue forcefully with the power of words and setting, for the truthfulness of their cause. Joseph Roach distinguishes this process as "improvised narratives," which rely upon remembering, forgetting, and blurring as fundamental elements of enacting legitimacy.[115] This fiction, whatever its veracity, effectively highlights the difference between memory and history, fact and faction.[116] One may legitimately ask how this collective memory could not be

112. Albert Boime, The Unveiling of the National Icons: A Plea for Patriotic Iconoclasm in a Nationalist Era 10 (1998).

113. The questions and declarations that she includes, such as scenes between father and daughter, verge on sentimentalism:

> Bruce glanced at the sky overhead and then back at his daughter. "Your fourth great grandfather, West Ford, was right when he said, 'Just because you have a light skin tone, it doesn't make you better.' Remember that always, Elise."
>
> Rising to his feet, he added, "Be yourself, daughter, don't let the color of anyone's skin rule your life."
>
> Elise stood, clutched her father tightly around his waist and murmured, "You're the best papa in the whole wide world."
>
> Bruce patted her on the head and said affectionately, "And you're the best daughter. Now go and help your sister watch Harrison."

Bryant, *supra* note 97, at 333.

114. Friedrich Nietzsche, On the Advantage and Disadvantage of History for Life 22 (Peter Preuss trans., 1980).

115. Joseph Roach, Cities of the Dead 3 (1996).

116. Nietzsche, *supra* note 114, at 22.

considered actual history. If the Fords represent this past as true—that they are the only descendants of George Washington—why should we hesitate, because of racial limitations, to believe it? The temporal ambiguity of the novel erases the chronological boundaries that distinguish past, present, and future. Time, in this analysis, finds no simple home. The past makes the present into an ongoing transhistorical fiction, where "historiographical labors"[117] create an analytical purgatory. In this way, the past does not claim a fundamental hold on the present, but it establishes a point of reference for the discussion of current events.

CONCLUSION

Traditional historians embrace a common trope of denial: genetic evidence does not represent conclusive proof, subjective accounts of kinship do not become truth unless mutually verified, and recorded oral history potentially memorializes historical exaggerations. Each of these methods of questioning the legitimacy of historic miscegenation operates from a legal standpoint that presumes the impossibility of verifying such claims. Because each of these stories originated during a period where open and legitimate race crossing was viewed as subversive, the act of defying the prevailing historical silence imposes a legal anachronism. How does one legitimate a bloodline from a prevailing paradigm that finds no common epistemic ground? In the antimiscegenation regime that permitted interracial sex but refused interracial marriage, a telling distinction arises. If marriage symbolically solidifies the union of two persons, and this liaison is ratified by the church and/or state, what becomes of the human outcomes of inevitable sexual contact outside of this realm of official approval? The prevailing legal system that separated blacks and whites in the Jim Crow South had ripple effects across the United States. Nonsouthern jurisdictions may not have prohibited state or church-sanctioned relationships between men and women of different races,[118] but this absence of prohibition fails to create a political atmosphere of racial equality and unbridled interracial association. The sting of miscegenation, whether illegal or not, did not depend on the vote of a state legislature.

Geography does not indicate an open acceptance of interracialism, and neither does time. *Loving* may have established a legal precedent for state-sanctioned marital freedom, but it still does not eviscerate the lingering taboo of miscegenation that affects contemporary interactions between people of different races. The antimiscegenation laws that once existed to prevent the soiling of the white race reify the property value concomitant with white racial identity.[119] This power of exclusion[120] maintains the

117. Michel de Certeau, The Writing of History 10 (Tom Conley trans., Columbia Univ. Press 1988) (1975).

118. *See* Newbeck, *supra* note 17, at 227–31 (listing statutes by state).

119. *See generally* Espinoza & Harris, *supra* note 14.

elevated value of whiteness, not only environmentally, as with neighborhoods and schools, but also transhistorically. Contemporary assertions of multiracial identity rooted in the past, when examined by the majority, remain illegitimate and improbable until accepted by the white ratifying authority. These stories of interracial affiliation seem implausible, and the narratives appear as romanticized fabrications of a marginalized people asserting their voice. When such assertions link to a collective political struggle of validating marginalized voices, this plea for acceptance calls for a progressive reinterpretation of racial possibilities. Admittedly, claiming descent from an American President approximates a claim to kinship with European nobility, yet these historically subversive claims uncover a discourse of cultural silencing and the price of narrative authority.

This essay aims to reverse the enforcement of anachronism. By pairing the racial restrictions imposed by the pre-*Loving* regime with contemporary debates over a multiracial past, we can better understand the continuing influence of antimiscegenation law. The weight of the past and its enduring precipitation of criminality erects a monumental barrier to developing a collective memory of a racially mixed nation. When the law exists as a Holmesian repository of all things that a society deems important,[121] changes in the legal system demonstrate a significant shift in the attitudes, beliefs, and desires of that society's members. Whether society follows law or law follows society goes beyond the scope of inquiry for this essay. Yet *Loving* stands as a dramatic shifting point that demonstrates the absence of barriers to achieving the nightmare that segregationists feared. The potential to legitimate all possibilities of race crossings—past, present, and future—should be realized as a result of this case. Compartmentalizing a racially varied nation only to events beginning after 1967 reaffirms the legitimacy of antimiscegenation laws that tautologically question the legitimacy of historically based pre-1967 interracial roots. Looking back to *Loving* as the Multiracial Epiphany reinforces the prevailing memory of racial separatism while further underscoring the illegitimacy of miscegenations past.

120. *Id*. at 1641–42.

121. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897), *reprinted in* 110 Harv. L. Rev. 991, 992 (1997) ("The law is the witness and external deposit of our moral life.").